



Federal Communications Commission
Washington, D.C. 20554

September 14, 2012

DA 12-1497

Donald J. Evans, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209

Re: Request for Waiver of Section 54.1003(b) of the Commission's Rules

Dear Mr. Evans:

This letter grants the waiver you request on behalf of your client, AMA Communications, LLC ("AMA"), an applicant for Auction 901, a reverse auction that will award up to \$300 million in one-time Mobility Fund Phase I universal service support.¹ We also grant your request for confidential treatment of the waiver request in accordance with the limited information procedures of Auction 901, until information regarding applicants' interests in eligible geographic areas in particular states and/or Tribal lands, their bids, and any other bidding-related actions and information is made publicly available after close of the auction.²

AMA requests a waiver of the Mobility Fund Phase I eligibility rule to the extent the rule requires that, prior to filing a short-form application for Auction 901, an applicant must have obtained any necessary approvals from the Commission for access to spectrum.³ In particular, AMA seeks a limited waiver of section 54.1003(b) because its proposed spectrum access for Auction 901 derives from spectrum leases, and one of the leases it identified in its short-form application was not approved by the Commission prior to the short-form filing deadline.⁴

The Commission may waive rule provisions "for good cause shown" by the petitioner.⁵ A waiver is appropriate only if "special circumstances warrant a deviation from the general rule and such deviation

¹ Letter to Marlene Dortch, Secretary, Federal Communications Commission, from Donald J. Evans, Fletcher, Heald & Hildreth, P.L.C., Re: Waiver of Auction 901 Prior Spectrum Lease Approval Requirement (July 11, 2012) ("Request").

² "Mobility Fund Phase I Auction Scheduled for September 27, 2012; Notice and Filing Requirements and Other Procedures for Auction 901," *Public Notice*, 27 FCC Rcd 4725, 4766-67 ¶ 147 (2012) ("Auction 901 Procedures Public Notice").

³ 47 C.F.R. § 54.1003(b); *Request* at 1.

⁴ *Request* at 1-2.

⁵ See 47 C.F.R. § 1.3. Although AMA seeks a waiver under section 1.925 of the Commission's rules, we find the section 1.3 rule is the appropriate rule under which to decide AMA's request because AMA seeks waiver of section 54.1003(b) and not of the "rules associated with licenses or applications in the Wireless Radio Services." See 47 C.F.R. § 1.925(b)(1). The waiver standard applied under section 1.3 and the waiver standard applied in the context of wireless radio services licenses, 47 C.F.R. § 1.925, have been found to be substantially the same. See *Delta Radio, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16891 ¶ 7 & n.19 (2003) (citing *Bellsouth Corporation v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)).

will serve the public interest.”⁶ A party seeking waiver should articulate the special circumstances and should show that deviation from the rule better serves the public interest.⁷ We may find that the public interest would be served by a waiver if a waiver would not conflict with the policy underlying this rule.⁸

Under section 54.1003(b) of the Commission’s rules, an applicant to participate in competitive bidding for Mobility Fund Phase I support must have access to spectrum that enables it to meet the performance requirements to receive support for the area on which it bids. An applicant must certify on its short-form application that it has such access at the time it applies to participate in the auction, *i.e.*, must have obtained any Commission approvals necessary for the spectrum access prior to submitting an application to participate in competitive bidding, and that it will retain such access for at least five (5) years from the date on which it is authorized to receive support.⁹ Under section 54.1005(a)(4) of the Commission’s rules, a short-form applicant must describe its required spectrum access.¹⁰ On May 2, 2012, the Commission released a Public Notice announcing the procedures and filing requirements for Auction 901, including a description of the disclosures and certifications an applicant needed to make in order to demonstrate that it had access to spectrum.¹¹ The *Auction 901 Procedures Public Notice* instructed applicants to describe whether they currently hold or lease the spectrum being disclosed in their short-form application, and whether their spectrum access was contingent on obtaining support in Auction 901.¹² Applicants were informed that as of the date of the short-form application, applicants must have obtained any necessary approvals from the Commission prior to filing the application.¹³ Applicants were also warned that a pending request for such approval would not be sufficient to satisfy this requirement.¹⁴

AMA concedes that one of the leases described in its short-form application had not been approved by the Commission as of the short-form filing deadline, but contends that its failure to obtain the Commission’s prior approval of the agreement resulted from an administrative error on the part of the lessor of the spectrum – not AMA, the lessee.¹⁵ Although the spectrum lease at issue had been filed with the Commission on July 10, 2012, which should have allowed for sufficient time to gain the necessary Commission approval in advance of AMA’s short-form filing deadline of July 11, 2012, Commission action on the lease was delayed by the “red light system” because of a \$71.84 delinquency the lessor owed to the Universal Service Administrative Company (“USAC”) for unpaid interest and penalties.¹⁶

⁶ See, e.g., *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”). Cf. 47 C.F.R. § 1.925(b)(3).

⁷ See *Northeast Cellular*, 897 F.2d at 1166. Cf. 47 C.F.R. § 1.925(b)(3)(ii).

⁸ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1155, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), cert. denied, 93 S.Ct. 461 (1972) (finding that the Commission may decide in some instances that rule waiver serves the public interest if an applicant’s proposal will not undermine the policy served by the rule). See also *Thomas Radio v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983). Cf. 47 C.F.R. § 1.925(b)(3)(i).

⁹ 47 C.F.R. § 54.1003(b); see also *Connect America Fund et al., Order*, 27 FCC Rcd 605 (WCB/WTB 2012).

¹⁰ 47 C.F.R. § 54.1005(a)(4).

¹¹ *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4754-55 ¶ 96.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Request* at 2.

¹⁶ *Id.* (AMA contends that the lessor was unaware that its payment practices to USAC were incurring interest and penalties.) In April 2004, to implement the Debt Collection Improvement Act of 1996, the Commission adopted

On July 11, 2012, the lessor wired the monies it owed to USAC resolving the outstanding debt.¹⁷ The Commission subsequently approved the lease on July 12, 2012, one day after the Auction 901 short-form filing deadline.

AMA argues that it should be granted a limited waiver of the Commission's Auction 901 spectrum access requirements because it had nothing to do with the circumstances that caused the delay of the Commission's approval of the spectrum lease, and it had no reason to believe that the lease would not be approved in time for its short-form filing deadline.¹⁸ AMA explains that the lessor was unaware of the delinquency owed to USAC until the lease was flagged by the Commission's red light system, and that the lessor immediately took corrective actions to resolve the debt.¹⁹ AMA states that the lease ensures AMA's ability to have access to spectrum so that it can provide the services for which it may become authorized to receive support.²⁰ AMA also contends that the delay in the Commission's approval of the spectrum lease was "extremely minor" and will not impede the Auction 901 process in any way.²¹

AMA therefore maintains that in this particular instance, the underlying purpose of the spectrum access eligibility rule will not be served by requiring, with respect to a particular geographic area identified in its Auction 901 short-form application, the Commission's prior approval of a lease that remained subject only to overnight processing, and that grant of the waiver described above will serve the public interest. We find that special circumstances exist to warrant grant of a waiver here. Although we believe AMA could have acted more diligently by seeking the Commission's approval of the lease in question more than one day before the short-form filing deadline, we conclude that the short delay, the fact that AMA was unaware of the lessor's USAC delinquency, the quick resolution, and the other circumstances that AMA describes, warrant a deviation from the rule in this instance. We also conclude that AMA has demonstrated that grant of the waiver would not frustrate the underlying purpose of the spectrum access rule in these particular circumstances. Upon learning of the delay of the Commission's overnight approval of its spectrum lease, AMA immediately took the steps necessary to lift the Commission's hold on processing the application, and notified the Commission of the problem that would affect its short-form filing.²² We find that but for the lessor's outstanding interest and penalties owed to USAC, the lease would have been approved by the Commission in time for AMA's short-form filing deadline.

In the *USF/ICC Transformation Order*, the Commission explained that failing to ensure spectrum access, on at least a conditional basis, prior to entering a Mobility Fund auction would be inconsistent

rules and policies known as the "Red Light Rule" and created a processing system frequently referred to as the Commission's "red light system" codified in part at 47 C.F.R. § 1.1910. Under Section 1.1910, "[a]ction will be withheld on applications...by any entity found to be delinquent in its debt to the Commission..." See generally Amendment of Parts 0 and 1 of the Commission's Rules – Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, *Report and Order*, 17 FCC Rcd 23096 (2004).

¹⁷ *Request* at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ *Id.*

²² *Id.* at 3.

with the serious undertakings implicit in bidding for support.²³ By adopting an eligibility rule requiring spectrum access and requiring an applicant to both describe and certify that its spectrum access had been approved, the Commission sought to ensure that a winning bidder would have the access to spectrum necessary to meet its build out obligations as quickly and successfully as possible.²⁴ The *Auction 901 Procedures Public Notice* notified applicants that only spectrum access that had received the Commission's prior approval would satisfy the rule's filing requirements.²⁵

We find that the circumstances presented here warrant a waiver of the spectrum access eligibility rule with respect to requiring the prior approval of a spectrum lease for the particular geographic area identified in AMA's Auction 901 short-form application. AMA had a fully executed lease for the spectrum at issue as of the short-form filing deadline. AMA also timely filed its Auction 901 short-form application, including the necessary description of its spectrum access and a certification that it would have access to the relevant spectrum for at least five (5) years from the date on which it might become authorized to receive support. At the time of the short-form filing deadline, AMA knew that the lessor's outstanding debt had been satisfied. Thus, as of the short-form filing deadline, the Commission's approval of this particular lease was solely a matter of overnight processing.²⁶ AMA therefore exercised reasonable diligence to satisfy the underlying purpose of the spectrum access eligibility rule by ensuring that it would have access to the necessary spectrum to meet its build out obligations, if it became a winning bidder in Auction 901. Here, applying the prior approval requirement of section 54.1003(b) of our rules to the spectrum lease at issue would not serve the underlying purpose of the rule in these particular circumstances, and grant of a limited waiver serves the public interest.

AMA also concurrently seeks confidential treatment under section 0.459 of the Commission's rules for its *Request* because it discusses information pertaining to AMA's bids and bidding strategies.²⁷ AMA fails to make the requisite showing for confidentiality under section 0.459 of the Commission's rules because the rule requires that a request for confidential treatment contain a statement of reasons justifying withholding

²³ Connect America Fund, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663, 17800 ¶ 396 (2011) ("*USF/ICC Transformation Order*"), pets. for review pending sub nom. In re: FCC 11-161, No. 11-9900 (10th Cir. filed Dec. 8, 2011); Connect America Fund, WC Docket No. 10-90 et al., *Order on Reconsideration*, 26 FCC Rcd 17633 (2011); Connect America Fund, WC Docket No. 10-90 et al., *Second Order on Reconsideration*, 27 FCC Rcd 4648 (2012); Connect America Fund, WC Docket No. 10-90 et al., *Third Order on Reconsideration*, 27 FCC Rcd 5622 (2012); Connect America Fund, WC Docket No. 10-90 et al., *Fourth Order on Reconsideration*, 27 FCC Rcd 8814 (2012).

²⁴ *USF/ICC Transformation Order*, 26 FCC Rcd at 17800 ¶ 396; 47 C.F.R. § 54.1003(b).

²⁵ *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4754-55 ¶ 96.

²⁶ In this case, a limited waiver of the prior approval eligibility requirement in section 54.1003(b) addresses the applicant's technical failure to comply with a Universal Service program requirement without undermining the underlying purpose of the rule, *see e.g.*, Request for Review by Richmond County School District Hamlet, NC, *Order*, 21 FCC Rcd 6570, 6573-74 (WCB 2006) (waiving technical violation of requirement that a schools and libraries universal service support recipient have a legally binding contract in place upon submission of its FCC Form 471 where the policy underlying the rule nonetheless had been met), because, under the facts of this case, we have no questions or concerns about the applicant's ability to satisfy important auction obligations. *Cf.* Ted Austin, Jr. Request for Waiver of Down Payment Deadline for Auction 62, *Memorandum Opinion and Order*, 25 FCC Rcd. 1439, 1442-43 ¶ 8 (WTB/MB 2010), app. for review pending, (where winning bidder's down payment was one day late, deadline was strictly enforced because waiver of the deadline would undermine the Commission's ability to meet its spectrum auction policy objectives). *See generally Mountain Solutions Ltd., Inc. v. FCC*, 197 F.3d 512, 517-18 (D.C. Cir. 1999) (upholding Commission policy of strict enforcement of down payment deadlines).

²⁷ *Request* at 1, 4.

of the information.²⁸ In addition, section 0.459(c) states that “casual requests” will not be considered.”²⁹ We find that AMA’s request is a “casual request” within the meaning of section 0.459(c). Because disclosure of the information would be inconsistent with the limited information procedures for Auction 901, however, we will, on our own motion, afford its *Request* confidential treatment in accordance with our Auction 901 rules and procedures. Accordingly, AMA’s *Request* will not be publicly disclosed by the Commission until the Commission discloses all non-public information relating to Auction 901 after close of the auction.³⁰

This action is taken under delegated authority pursuant to section 0.331 of the Commission’s rules.³¹

Sincerely,

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division
Wireless Telecommunications Bureau

²⁸ 47 C.F.R. § 0.459(b).

²⁹ 47 C.F.R. § 0.459(c). Moreover, section 0.459(a) requires a confidentiality request to be attached to and to cover all copies of materials to which it applies. 47 C.F.R. § 0.459(a). AMA’s request includes no such cover.

³⁰ *Auction 901 Procedures Public Notice*, 27 FCC Rcd at 4766-67 ¶ 147.

³¹ 47 C.F.R. § 0.331.